

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

|                            |   |                             |
|----------------------------|---|-----------------------------|
| STATE OF OKLAHOMA,         | ) |                             |
|                            | ) |                             |
| Plaintiff,                 | ) |                             |
|                            | ) |                             |
| v.                         | ) | Case No. 05-cv-329-GKF(SAJ) |
|                            | ) |                             |
| TYSON FOODS, INC., et al., | ) |                             |
|                            | ) |                             |
| Defendants.                | ) |                             |

**STATE OF OKLAHOMA'S MOTION FOR A STATUS CONFERENCE  
REGARDING MATTERS PERTAINING TO THE  
STATE'S MOTION FOR PRELIMINARY INJUNCTION**

**Expedited Consideration Requested**

**I. Introduction**

The State's Motion for Preliminary Injunction will be heard by the Court starting on February 19, 2008, and continuing into March. As with any trial or lengthy hearing, the parties are expected to exchange certain information before the start of the hearing, and in some cases, submit to discovery. The State attempted to discuss certain pre-hearing details with Defendants on January 17, 2008. During that meet and confer, however, the parties only reached agreement on one issue.<sup>1</sup> Unfortunately, there are a number of other issues that the parties cannot agree on, and so, the State respectfully requests a status conference so that the Court can establish rules on pre-hearing disclosures and discovery.<sup>2</sup>

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<sup>1</sup> During the meet and confer, the State offered to make witnesses employed by the State available to testify live for Defendants' case-in-chief, but Defendants rejected that offer, wishing instead to play the Court selective edited portions of these witnesses' recorded deposition testimony. The parties agreed that if Defendants wish to play to the Court previously designated deposition portions, then the State may play cross-designated portions of that deposition or call the witness live.

<sup>2</sup> Defendants' proposals on these issues are set forth in Exhibit 1.

## II. Argument

### A. Defendants' disclosure of their experts' opinions and materials considered

The State believes that Defendants should disclose their experts' opinions, as well as the materials considered by those experts, no later than February 8, 2008 -- the same date that Defendants' response to the State's Motion for Preliminary Injunction is due. This date is nearly three months after the State filed its Motion for Preliminary Injunction and accompanying expert affidavits containing the expert opinions upon which the State expects to rely. Defendants, however, have taken the position that they are not obligated to disclose all of the expert opinions upon which they expect to rely on February 8, 2008. Making matters worse, instead of disclosing the materials considered by their experts in forming their opinions at the same time expert opinions are disclosed (*i.e.*, on February 8, 2008), Defendants seek to delay the disclosure of these materials until February 12, 2008.<sup>3</sup> Fundamental fairness dictates that the State receive both Defendants' expert disclosures and considered materials no later than February 8, 2008 -- which is less than two weeks prior to the scheduled start of the preliminary injunction hearing.

### B. Depositions of Defendants' experts

During the December 7 hearing before this Court, the State proposed that if Defendants would make their expert disclosures at least two weeks prior to the start of the preliminary injunction hearing (*i.e.*, February 5, 2008), then the State would forego depositions of those experts. *See* Dec. 7, 2007 Transcript, 43:7-12. Defendants, however, have flatly refused to make their expert disclosures at least two weeks prior to the start of the preliminary injunction hearing. Indeed, as noted above, they have even refused to complete all of their expert disclosures by February 8, 2008, the due date of their response to the State's Motion for Preliminary Injunction.

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<sup>3</sup> On December 31, 2007, the State served discovery requesting disclosure of the materials considered by Defendants' experts.

Accordingly, the State has served notices on Defendants, seeking the depositions of their experts beginning on February 12, 2008. Defendants have advised the State, however, that they refuse to tender their experts for deposition at all, let alone beginning on February 12, 2008.<sup>4</sup> Given Defendants' refusal to disclose expert information in a timely manner, fundamental fairness dictates that the State have the opportunity to depose Defendants' experts beginning on February 12, 2008.

**C. Right of State's experts to refine / bolster opinions**

The State continues to prepare not only its preliminary injunction case against Defendants, but also the remainder of its case. It is, by way of example, continuing to collect and analyze information, review documents and discovery, and take depositions. Furthermore, new discovery continues to be produced to the State by Defendants in response to long-outstanding discovery requests.<sup>5</sup> The State's experts continue to review and consider relevant information related to both issues raised in the Motion for Preliminary Injunction and the case as a whole. (In fact, many of the State's Rule 26 expert reports for the case as a whole are presently due on April 1, 2008.) Defendants have taken the position that the State's expert preparation should be frozen in time as of November 14, 2007, when the State filed its Motion for Preliminary Injunction. In effect, Defendants have demanded that the State's experts stop working. Defendants' position is unrealistic and improper, particularly in light of Defendants'

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<sup>4</sup> Defendants are scheduled to begin putting on their case on the afternoon of February 21, 2008. Because of scheduling issues, the State and Defendants have reached an agreement to present Dr. Lawrence, one of the State's experts, after Defendants begin presentation of their case.

<sup>5</sup> For example, earlier this month, as a result of a motion to compel, Defendants finally began producing information purportedly answering the State's very first interrogatory -- served in April, 2006 -- dealing with such fundamental information as bird counts in the Illinois River Watershed. The State says "purportedly" because the information being provided is not in full compliance with the Court's order at the December 6, 2007 hearing or its December 7, 2007 written opinion.

discovery intransigence, *see, e.g.*, fn. 5, and the State's need to continue with its Rule 26 expert report preparation. To the extent that the State's experts come across information that causes them to refine or bolster the opinions that were disclosed in connection with the State's Motion for Preliminary Injunction, the State's experts should be freely allowed to do so. Of course, should they do so, the State will disclose the relevant reliance materials.

**D. Timing of disclosure of fact witnesses and page-line designations**

The State submits that there should be a simultaneous disclosure of fact witnesses and page-line designations, rather than a staggered disclosure of fact witnesses, and that these disclosures should occur on February 12, 2008. The simultaneous disclosure approach is consistent with traditional trial practice and, in fact, the Amended Scheduling Order. Like their refusal to timely disclose their experts' opinions and expert materials, Defendants' proposed delay in disclosing their fact witnesses and page-line designations is another example to gain a tactical advantage at the expense of fundamental fairness. The disclosure of fact witnesses and page-line designations should be simultaneous, not staggered, and should occur on February 12, 2008.

Moreover, the State requests that Defendants indicate on which day they plan to play deposition testimony of witnesses who are employed by the State. Because Defendants wish to play selective testimony to the Court instead of calling such witnesses (who can be available live), the State needs to know the timing of this presentation so that it can arrange for these witnesses to be present in the courtroom.

**E. Timing of disclosure of exhibits (including Rule 1006 summary exhibits and demonstrative exhibits)**

Traditional trial practice and, in fact, the Amended Scheduling Order contemplate simultaneous disclosure of exhibits. For the same reasons stated above, there should be

simultaneous disclosure of exhibits in connection with the preliminary injunction hearing. The State proposes that the disclosure of exhibits occur on February 15, 2008. The State proposes that Rule 1006 summary exhibits and demonstrative exhibits be disclosed three days before the start of the presentation of each side's case.

### **III. Conclusion**

Therefore, the State respectfully requests a status conference regarding the aforementioned matters pertaining to the State's Motion for Preliminary Injunction at the Court's first available opportunity.

Respectfully Submitted,

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